UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE: NATIONAL COLLEGIATE ATHLETIC ASSOCIATION STUDENT-ATHLETE CONCUSSION INJURY LITIGATION SINGLE SPORT/SINGLE SCHOOL (FOOTBALL).	MDL 2492
CHRISTOPHER BURKHOLDER, et al., Plaintiffs, vs. WAKE FOREST UNIVERSITY, et al., Defendants.	No. 16 C 8727 Chicago, Illinois March 22, 2023 9:30 o'clock a.m.

TRANSCRIPT OF PROCEEDINGS -
Hearing
BEFORE THE HONORABLE MANISH S. SHAH

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(Proceedings heard in open court:)

THE CLERK: 16 CV 8727, National Collegiate Athletic Association Student-Athlete Concussion Injury Litigation.

THE COURT: Good morning, everyone. Nice to see everybody in person.

We had everyone sign in, so your appearances are noted for the record, so we're not going to take roll now.

So let's talk about what we're doing here and what we're doing next in light of the status report and the proposal for class certification and a change in approach for class certification.

I suppose the best way for me to start is just with some questions for plaintiffs.

If this new approach to seek issue certification -- first, let me make sure I understand correctly that, at least in the four sample cases, plaintiffs are not seeking to certify a class under 23(b)(3) at all.

Do I have that much right?

MR. EDELSON: Yeah. Your Honor, Jay Edelson, lead counsel. That's correct.

THE COURT: Then -- but you're not taking that position with respect to the other cases in the MDL?

MR. EDELSON: No. But I think it's fair to -- for everyone to see that as a signal of where we might go.

THE COURT: So my question is, then, why are these

even sample cases? If I don't know now that they are, in fact, representative, what are we doing with these as sample cases?

And if the approach is going to be, there is not going to be a 23(b)(3) class, and ultimately these will be individual, at least as to judgment, then the next question is, what is this MDL for?

But that's a little bit later --

MR. EDELSON: Okay.

THE COURT: -- in my thinking. But at least let me better understand -- and this is before my time. But you selected these sample cases, and you were going down this path with these sample cases, and now, without any kind of confirmation that they are, in fact, representative of all the other cases, I am concerned that maybe these aren't the right samples.

MR. EDELSON: May I address that now?

THE COURT: Please.

MR. EDELSON: I understand that concern. The -- so when we picked the sample cases, Judge Lee was explicit that, based on the rulings, it may be that parties start adapting and changing theories, et cetera.

To be clear, as I said, everyone should take this as a pretty clear signal to where we are going. So unless Your Honor does something which we don't expect, or there's a change in -- you know, a Seventh Circuit case comes down, no one knows

about, we are going to proceed under the same theories.

The only caveat I want to have is that these are specific cases. And it may be in one of the other cases that there is a way to have a damage class certified. Again, I don't expect that. But those would be the exception.

If you ask me to predict what's going to happen, they will proceed like these are proceeding.

THE COURT: When would you know whether there is ever going to be a (b)(3) class in these cases?

MR. EDELSON: Well, the -- I guess they're not going to be (b)(3) classes in these cases, Your Honor.

So the only way something like that would happen would be if we found something which we're not going to find discovery in other cases, or if there was some significant change in the law in the, you know, Seventh Circuit or Supreme Court.

So those aren't real possibilities. We're -- honestly, we're just being lawyers and just saying, you know, we don't know what the future holds. But --

THE COURT: Understood. But in order for me to manage things going forward, I think it's best for me to get commitments as solid as I can get them so that I understand what we're looking at.

And if you are saying that there is not going to be a (b)(3) class, let's just say, in these four sample cases, if

you're saying that and announcing that now, a question I have is, what kind of class actions are they, then? Are these (b)(1) class actions? (b)(2) class actions? They're not (b)(3) class actions.

Just looking at the rule, you've got 23(a) and then you've got 23(b) that says: There are the following types of class actions. What type of class action is this before we get to 23(c)?

MR. EDELSON: Amy, do you want to handle that or am I putting you on the spot?

These are issue classes under (c)(4).

THE COURT: Right. But 23(b) identifies the types of class actions under the rule: "A class action may be maintained if Rule 23(a) is satisfied and if," then you've got (b)(1), (b)(2), and (b)(3), before you get to (c).

So you've said this is not a (b)(3) class. I don't think this is a (b)(2) class. So then I think that leaves (b)(1). But I just want to make sure I know what your position is.

MR. EDELSON: Your --

MS. HAUSMANN: I think (b)(1), Your Honor. I think (b)(1) is satisfied and then you can move on to (c)(4).

THE COURT: If these are cases that are amenable to issue classes, then what's the vision going forward? Then seeking partial summary judgment on the merits of those issues?

Is that what the plan would be for plaintiffs?

MR. EDELSON: So we're actually doing this in a parallel case, the *Portland Wildfires*, where the court certified an issues class.

The way it proceeded was either side had an opportunity, of course, to seek summary judgment on the issues. In the *Portland* case, it's going to trial. And so the trial will be as to liability.

And so going back to this case, if this happened and we certified it, and then the defendants won, as you know, case over, everybody's claims are extinguished. If we win, then it goes -- as traditionally happens in an issues class, it goes to the next phase, which would be individual damage trials, but liability will have been established.

THE COURT: But would liability be established on the issues that you're proposing?

MR. EDELSON: Your Honor, you're --

THE COURT: It seems very different to me.

MR. EDELSON: No, no. You're correct. I spoke imprecisely, and I appreciate that.

It's not -- it wouldn't be total liability. It would be on these issues. So certain key issues would be decided.

And certainly those issues are significant enough that the main defenses of -- for the NCAA and its member institutions and the conferences, if they won, it would dispose

of the whole case.

But you are correct, it wouldn't just be damages, because they would have other arguments, too. Causation would be one argument.

THE COURT: And you would have other elements to prove.

MR. EDELSON: That --

THE COURT: If you prevailed on, say, an issue of whether there is a duty, that's not enough for liability to be established.

MR. EDELSON: The -- correct. Although, although I think that -- we haven't finished discovery in all of these, but I -- what our hope would be would be to get as many issues as possible, including whether that duty was violated.

THE COURT: That's not your proposal.

MR. EDELSON: We -- I understand that. We had -- of the four sample cases, in one case, we got 10,000 documents; in the other three cases, we haven't gotten any documents.

THE COURT: Well, that is what it is. I am just trying to understand what the approach is and what the plan is.

And in your position, you've identified the general issues. And I understand that you didn't pin yourself down that these are the only issues that you are going to seek certification on. But I think in order to have a meaningful discussion, I took your statement to be here's the framework

for what you're thinking about.

And, as I thought through them, I thought: Well, if we certify an issue class -- that's one step -- that doesn't answer the question that's posed by the issue. It's just saying this issue is amenable for class-wide resolution.

But then does the answer to the question that's posed by the issue, does that even resolve the case? And if it doesn't, then what are we talking about? We're talking about either partial summary judgment or a trial on an issue that then does not resolve in a final judgment of any kind. And what kind of trial is that? Is that even a constitutional trial if a jury is -- if it requires a jury?

So I am trying to think through what's the end game here so that I can understand how best to manage the puzzle right now.

So that was just me talking to give you an opportunity to think, so that we can try again and say: Well, what happens if I certify these kinds of issues? What would the next stage of the case be? And if it doesn't resolve in a final judgment, resolving the case or controversy in the sample case, what are we doing?

And am I going to send all of these cases back for individual adjudication in their respective districts? Or is this still really the purpose of the MDL that was sent here in the first place?

MR. EDELSON: Your Honor, so a couple points.

First, I appreciate the discussion. I understand where you're coming from.

Obviously, our preference would be that we discuss this through the briefing, where we move for the issues class. They respond, making some of these points Your Honor's making. We would obviously now know to address them in the motion itself and let Your Honor consider that. That would give us more of a chance to reflect on it.

I can say, as a practical matter, if these common issues are decided, we are going to be -- I hate using a football metaphor given the case, but at the ten-yard line.

So these cases have been proceeding in federal court, but also state court where they started to be tried, and that the major defense -- I'm speaking for myself. They may have other views -- the major defense is whether a duty was owed, especially by the NCAA.

If that is determined on a class-wide basis -- the whole point of -- I believe, of sample cases is to inform the parties about how best to approach more general, including settlement.

If we go to trial and lose, that is going to inform settlement. My guess is the settlement value will be nothing. If we win on that, then we will sit down and say: Okay. We now can do thousands of trials, which I think is what would

happen, and they'd go back to their original districts, or we can try to come up with some sort of matrix. I think that's the whole point of sampling.

THE COURT: I mean, I agree that that's the point of sampling. I am wondering if this shift in approach is achieving the goals of sampling or not.

There are many decision points in a case. And issues can get resolved at different points in a case that will affect settlement value. I get that.

And I am all in favor of finding creative ways to cut to the chase so that people can make informed decisions. That's all well and good as well.

Let me shift gears to ask about the personal jurisdiction issue that was raised in the status report and plaintiff wanted some more time to think about that.

What's your position about the personal jurisdiction issue raised by the SEC?

MR. EDELSON: Well, so if -- this approach of we're going to unstay the cases and then everyone submits one declaration and then the Court decides, that would not be something we would think would be appropriate.

So if Your Honor wanted to entertain personal jurisdiction motions, then we have to do it, we think, in the proper way, which would entitle us to get discovery, including deposing people.

And this is not an academic argument. We've done this in a separate case with BYU, where they said: Oh, we're not involved in California at all. No jurisdiction. And then when we actually got discovery, we found out that they did an incredible recruiting effort in California, private helicopters, et cetera. And we ended up winning on that issue.

So I think the whole point of staying these other cases is to have them stayed. If the Court thinks it's important to start deciding some other issues, we don't have an issue with that. We don't have a problem with that.

THE COURT: Do you think that BYU example is applicable to the conference argument on personal jurisdiction that has apparently been resolved, at least in the *Richardson* case here?

MR. EDELSON: The -- what activities the conference participated in in Illinois would be relevant. Obviously, it shifts. It's different than a school that's recruiting. But the conferences do a lot of work in other states.

That's our belief. If we're wrong, then, you know, then we're wrong, and we'll say that.

THE COURT: Are there other cases, stayed cases, that are exactly on all fours with the prior ruling in this case on lack of personal jurisdiction?

So is there even a -- would you agree that there's at least a subset that is essentially not going to be

individualized in light of the existing ruling?

MS. HAUSMANN: There may be other cases, Your Honor, in which the SEC was named as a defendant, and so some of the same facts would apply.

I think that it does depend on exactly what school. I don't know if the SEC has different recruitment efforts for different colleges.

But there's also just, I think, a practical matter of logistics here. The cases are stayed. And so even if the Court were to deny personal jurisdiction in the Northern District of Illinois, we could -- in many states, we would be able to re-file in an original court and then transfer back into the MDL.

And so, you know, our belief is that if the cases are stayed, there's not really much utility in going through that process now as opposed to later when those cases are unstayed.

THE COURT: Does -- can I call on someone on the defense side for the SEC to talk about the personal jurisdiction issue?

MR. FULLER: Yes. Your Honor, Robert Fuller with Robinson, Bradshaw & Hinson representing the SEC.

We're no longer a defendant in any of the sample cases, now that we've been dismissed from *Richardson*.

And the reason that we've made our submission through the status report, in the cooperation of the others, is there's

an order somewhere in this case that doesn't let anyone file something unless they're counsel for -- a lead counsel in a sample case.

A couple of things that I wanted to correct.

The issue is not whether there's personal jurisdiction in Illinois. The issue is whether there's personal jurisdiction in the original transferor court.

The judge -- Judge Lee explicitly denied the request for discovery in the *Richardson* case, holding there was nothing to discover.

And I think we all know, as a matter of common sense, that the SEC doesn't recruit players. The schools do. They would not be very happy if we took sides on that.

The way we see this, these cases have been centralized for MDL proceedings. A threshold issue in every case is whether there's personal jurisdiction. It's perfect for coordination. There's clearly not personal jurisdiction in a number of the cases.

And there's really no reason to kick this can down the road, because if we come back in a year, two years, three years, we're still going to have to address the personal jurisdiction issues.

So whatever's going on with class certification, issue classes and so forth, it seems to us more efficient to get the personal jurisdiction issues out of the way. Your

Honor can rule on them. You can assign them to a magistrate. We could use the abbreviated procedure we suggested or we could just file motions.

To make it clear, we're not seeking to unstay all these other cases. We just think it would be efficient and prudent to get the cases -- if they're going to re-file in what they think is the right jurisdiction, they can have at it. But we're going to have to go through that process before there's any personal jurisdiction over any of these cases.

And we've been a defendant now since 2016 in cases where we don't think there's any personal jurisdiction. We'd like to get that clarified.

THE COURT: As a formal matter, though, wouldn't I have to, at a minimum, modify the stay of the other cases in order to pass some sort of judgment on personal jurisdiction in them?

MR. FULLER: I think that's logically true. But I -- what I mean is we're not asking for a wholesale lifting of the stay. We think this one issue can be presented, if a defendant wants to present it. We would like to go ahead and present it. If some defendants want to remain stayed, that would be obviously up to them.

THE COURT: The NCAA didn't take a position on whether they would want to take advantage of this or not.

As much as I was trying to pin one side down, can I

try and pin the other side down?

And so what are you really doing here? And we're all here together right now. Can you tell me what the NCAA's position on personal jurisdiction is?

MR. MESTER: Thank you, Your Honor. Mark Mester for the NCAA.

We weren't trying to be evasive, but I don't think we have anything near the personal jurisdiction argument that Mr. Fuller and the SEC does, in large part because the vast majority of these cases were filed in Indiana and were in Indiana.

So I -- it was more not thinking about it much. I don't want to -- in the same way, I want to be careful as a lawyer. I don't want to say never. But I don't think we are in any way, shape, or form in the same position that the SEC or other conferences and institutions are.

MR. KAIRIS: Your Honor, Matt Kairis with Jones Day, lead counsel for the institutions.

There's about 110, 115 institutions in the stayed cases. And just straw-pulling, probably more than half of those would be interested in pursuing the same personal jurisdiction path that the SEC is raising.

And when you think about it, included among those schools are extremely small schools with small football programs that never leave their state footprint and don't

recruit outside of the state. And most of those schools were sued in Indiana. You know, the vast majority of them likewise have had a lawsuit hanging over their head for five-and-a-half years and feel strongly there's no personal jurisdiction for those cases.

There's other institutions in the group that wouldn't pursue personal jurisdiction or would kind of abide by the stay and preserve that argument, to make it down the road, but there's a significant number of institutions that believe that, under the *Richardson* decision, they equally would have an immediate path to challenge personal jurisdiction.

MS. HAUSMANN: Could I respond very briefly to that, Your Honor?

THE COURT: Sure.

MS. HAUSMANN: Just to say that the *Richardson* decision -- each of these motions is likely to be fairly factual, whether each school, their recruitment efforts, how often they were meeting with NCAA officials in Indiana, questions like that. And so I don't think that the *Richardson* decision is particularly binding across, you know, all of these different member institutions.

THE COURT: Well, one option might be to start with maybe just the SEC and the cases in which the SEC has been named as a defendant and see if there's a bucket of cases there that don't require further factual development, because the

Richardson decision is squarely on point for that. And then if that somehow is able to be resolved, that might then serve as a model for other personal jurisdiction arguments. But there might very well be hundreds of defendants where the question of personal jurisdiction is going to be more fact-dependent and would require time and effort that maybe we shouldn't be spending on if the whole point of where we are today is that there are supposed to be these four cases that are samples that are supposed to guide everybody in a useful and cost-effective way.

So I don't think there's much more to be gained by talking about this personal jurisdiction issue. I think I need to think a little bit more about what might make sense to see if that issue can be raised now, and in what form. So I'll have to give that some more thought.

On the class certification issues, one thing that I am thinking about is before you do any more discovery on class certification, there might be an opportunity to tee up some of these issues now, as in: Does there need to be an amended complaint? Is continuing down the path of issue class certification actually going to be a cost-effective and meaningful way to sample these cases?

In light of what the end game might be, if issue classes are certified, maybe we should talk about that and get firmer legal grounding on what would be happening before you

continue down discovery on class certification.

So that's one thought. We haven't talked about whether there needs to be an amended complaint or not, so why don't we talk about that, just briefly. And I'll ask the defendants to talk about this a bit.

My initial take is that there's probably not a requirement that there be an amended complaint. My takeaway was the defense might want an amended complaint that formally doesn't say anything about 23(b)(3) or omits 23(b)(3), perhaps so that you can say *American Pipe* tolling is over now, because this pleading has been filed that does that.

So my question is, is that actually necessary, do you think, from the defense perspective? Or are some of the things that they've said today or said in their status report enough to say that they've abandoned 23(b)(3), at least as to the sample cases, so it is what it is?

I don't really think of an amended complaint or the original complaint as some kind of notice device to absent class members. I don't think that's what complaints are for.

So that was some of my reaction to what was going on in the status report. But is there something more you want to say about the idea of amended complaints?

MR. MESTER: Yes, Your Honor. Mark Mester again for the NCAA.

I think there's a variety of reasons why it would be

prudent, whether it's required or not, to have an amended pleading, and I think a couple of those reasons were actually illustrated today.

I think if there's going to be an issues class -- and for the reasons we set forth in the status report, we think there shouldn't be. But if there's going to be one, I think we definitely want to know what those issues are before we go to take discovery.

And just today, we heard Mr. Edelson throw in a new issue that's not in the status report, and that was whether or not we had violated a duty. That's nowhere to be found in the status report.

But what I certainly wouldn't want to do is to have Your Honor set a schedule and have us go take discovery, and then have them file their motion for class certification with new issues, and then we come back to you and say: Well, now we need to take more discovery on issues that were identified.

So I think that's one of several benefits. I do think there are other benefits, though, not the least of which being it is notice to the class. Is it an imperfect notice to the class? Certainly. It's not the same as sending out a postcard or an e-mail. But my sense is there's a number of counsel out there in the country that are following these cases.

We've been approached by potential claimants who may

or may not want to pursue an individual case against the NCAA, and they're watching the docket. And I think an amended complaint that does away with the (b)(3) class claim and that replaces it with a (c)(4) claim with identified issues would be a signal to those people and something that they'd want to take into account in deciding whether or not to pursue a class claim -- I mean, excuse me, an individual claim. So I think that is a benefit.

In terms of your tolling question, Your Honor, I think certainly a stipulation today or an indication from Your Honor that the (b)(3) claim is now out, the damages claim is out would probably be sufficient for purposes of that line in the sand, so to speak, for purposes of determining tolling.

But I think the clarity that would be provided by an amended pleading would be helpful for a number of other reasons.

THE COURT: Have you given any thought procedurally how to more formally tee up and resolve these issues? For example, a motion from the defense to compel amendment of the complaint? Or a motion from the plaintiff to amend a proposed class definition? Some procedural vehicle that's maybe superior to status reports to crystalize the debates that we're having so that then I can chime in and figure out how to do this?

All of which is harkening back to what I said just a

few moments ago, which is I think there are some things to figure out now before you go further down the road of discovery, class certification discovery.

So I am trying to figure out, what is that mechanism? If it exists. Maybe it doesn't exist. Maybe it's just you need some guidance from me. But then you have to do discovery and then we do a traditional motion for class certification.

MR. EDELSON: Your Honor, Your Honor, I know this wasn't directed, but perhaps I can be helpful --

THE COURT: Go ahead.

MR. EDELSON: -- with a solution.

So I -- we actually don't need to do more discovery so long as the discovery that was done in the state courts can be used in our cases.

And we would agree only for purposes of class certification. If they've got issues about merits and everything, fine, we can deal with that later. What that would allow us to do is move very quickly. And then we can present these arguments. And if they want to say: Oh, no. You've got to create a new rule where you've got to amend a class definition, which would be a disaster if that's a rule -- because in every class action, you file a complaint and then you take discovery, and the class can change. And that's what happens. And it can change now or in the middle of discovery or after discovery. But we can deal with all that then. They

could make those arguments: You know, the plaintiff should have amended, and deny certification because of that.

In terms of kind of the practical thing of other lawyers need to know what's happening in the case, I am pretty confident Law360 will alert them.

But also, this is not an unwieldy group of lawyers. We're all talking. They know this. There's a large steering committee of people who've got federal cases and state cases.

And a solution of some sort of stipulation is totally fine. If anyone wants more clarity, we are not pursuing a (b)(3) class in the four sample cases, nor do we expect in the other cases to be pursuing it, absent something which is not conceivable to me.

You know, I've -- I'm speaking kind of as plainly as I can. And I don't mind putting that in a stipulation, if that's of some help.

THE COURT: In your proposal, you were seeking a deadline of June 2nd for completion of fact discovery on issues relating to class certification. What you just said suggested that you're ready to go now if you can use the discovery from the state cases, so -- but maybe I'm misinterpreting what you were just saying.

MS. HAUSMANN: That was in part for the defendants' benefit, Your Honor. They have not yet deposed our class reps. And we agree that deposing the class reps would be a reasonable

thing to do before moving for class certification. So that, I think, is, in large part, the reason for the June 2nd fact discovery deadline.

MR. MESTER: Your Honor -- I'm sorry.

THE COURT: Go ahead.

MR. MESTER: If I may? Just two quick points.

On the issue of the discovery from the state cases. And I recognize that was not a focus of the status report. And this is certainly a voluminous record. But that issue, in fact, has already been fully briefed and decided not only by Magistrate Judge Weisman, who denied their motion to get that discovery, but then affirmed by Judge Lee on a Rule 72 objection.

So I think that issue is decided. And there are a variety of reasons why that doesn't make sense, and they're all set forth in the briefing.

But what I am troubled by, Your Honor, is we're six years in; and at some point, they do have to put their cards on the table and they have to stick with it. And there's irony in that, because the primary case that they relied upon in their status report was *Chapman*, the Seventh Circuit decision, and that's exactly -- putting aside the dicta, that was exactly the ruling in that case. Judge Ellis decided four-and-a-half years was enough time, that you need to put your cards on the table and you need to stick with it.

And this inability to pin them down and not know what we're doing discovery for is a problem, having taken already a fair amount of discovery on damages, only to find out that that discovery may be just out the window.

I am sensitive, and, as you can imagine, Your Honor, our client is sensitive, and all the member institutions and conferences are sensitive as well.

The last point and then I'll stop.

I think there's a real problem if there's a disparity between the sample cases and the non-sample cases, and it goes back to the issue I raised earlier.

If there's a recipe for confusion amongst absent class members, that seems to me it's it. Because if I'm an absent class member in a non-sample case, am I going to be able to distinguish between what's going on in the sample cases, which I naturally assume is indicative of what's happening in the non-sample cases? That's a pretty fine line, and it's asking a lot of a lot of people.

So I think there's a lot of reasons, and this is only one of them, but to have symmetry between the sample cases and the non-sample cases.

THE COURT: But the only asymmetry right now is this (b)(3) now, right? There's no asymmetry in the issues that they're flagging for a potential class certification.

MR. MESTER: Your Honor, with respect, I don't know.

I mean, they won't even commit to the non-samples being no longer (b)(3). So I literally don't know.

THE COURT: They've come close.

MR. MESTER: They've come close.

MR. OLSEN: Your Honor, Mike Olsen, lead counsel for the conferences. Two quick points.

Just one addition to counsel's comment about discovery. She's right, we need to take the class reps. Whatever path we choose. There are also a handful of document issues that are part of those class rep deps. We're going to move quickly.

Whatever plan we decide on, with Your Honor's help, to complete that. But just wanted you not to be surprised. If we can't work that out, there may be some limited document issues that come to your attention in the near term.

The second point, just to pile on, with respect to the last issue you were discussing. That's the whole point of what we've been doing for the five-and-a-half years, is to create an MDL with sample cases that's going to efficiently resolve these issues.

And to say that: The (b)(3) issue may or may not. We can't tell you now. We don't think it's going to be different. But that could be different if we lose class certification on these issues, or something else happens, or whatever else might be different with respect to new issues or

different things, kind of defeats the entire purpose of what the MDL was set up to do.

And so whether it's a stipulation or some kind of motion vehicle that provides clarity as to what issues they're attempting to seek certification on, and that the (b)(3) issue is dead across the cases, we think that's imperative with respect to the MDL.

THE COURT: Can we circle back to the question that I asked, which is, what is the procedural mechanism to tee these up, other than what might be a perfectly correct procedural vehicle, which is a motion for class certification? What other procedural vehicle would the defense have in mind?

MR. MESTER: Sorry, Your Honor.

I -- the one that comes first to mind is a motion for leave to amend that includes a proposed complaint that has attached to it -- attached to the motion that has the issues that they are going to seek to have certified identified.

I think that's how it typically would be done. And that motion then would raise a number of avenues, issues that could be raised with respect to timeliness, with respect to the implications for the sample case, and also issues of futility.

So I think all of those would come into play. And a motion for leave to amend would be, I think, as apt a candidate as any.

THE COURT: Do you think there's such a thing as a

motion to compel plaintiffs to amend the complaint?

MR. MESTER: Your Honor, my mentor filed a motion to lodge one time, so I guess there's any motion.

I admit, I hadn't thought of that. But I'm sure that could be done.

I mean, I do think there is a -- and I don't mean to be flip about it, but there's a need to get clarity and to lock this down. Because I know Your Honor's going to want us to complete discovery in the near term. And I'm very concerned that if it's a moving target, we're going to, again, take a lot of discovery that's not going to be relevant to the motion that gets filed, the motion for class certification.

MR. EDELSON: Your Honor --

THE COURT: Hold on.

MR. EDELSON: I apologize.

THE COURT: Do you think there's any need for more clarity right now in advance of taking the class rep depositions or the lingering document issues that were just flagged?

MR. MESTER: I certainly do, Your Honor. We need to know what the issues are in order to depose the named plaintiff, provided that the specter or the prospect of an issues class is still in play.

MR. OLSEN: And, Your Honor, it would certainly be relevant to the expert discovery that would follow, then.

THE COURT: Well, I think the -- I do see how the expert discovery would be dependent on what the potential class definition is/issue, the articulation of the issue, but I am shifting gears slightly to think about: What are you going to do in the next few weeks while I'm mulling some things over? I'm sure you have plenty to do. But can you start getting class rep depositions on the books and confirming those kinds of things, hammering out whatever document issues you're having, even though you might still be a little bit at sea?

MR. MESTER: Your Honor, we can certainly address the discovery issues. We'll have the discovery conference and get a motion to compel on file if they can't be resolved promptly.

MR. KAIRIS: Your Honor --

THE COURT: Go ahead.

MR. KAIRIS: I'm sorry. Your Honor, before we leave that topic, just for the institutions that are subject to the stayed cases, there was a lot of time and effort that went into putting the bellwethers together.

And Mr. Edelson was talking about, you know, how the purpose of the MDL to go through, is to get to some point where there can be settlement conversations. Well, the whole risk analysis is entirely different if the bellwethers are in one world, where it's whatever results from a (c)(4) issues class; whereas all of these hundred-and-some institutions in the stay have the prospect of a damages class.

How do you -- how can they make any intelligent decisions as they watch the bellwether process unfold?

And Your Honor addressed *American Pipeline* tolling. The same. If the bellwethers switch to (c)(4), an entirely different risk analysis for all of the stayed cases if they're not making that same analysis on tolling.

So it -- I think it's imperative, where we have bellwether cases that are supposed to be representative of all of these cases, that we keep them on the same path, and whatever modifications are made in the bellwethers cases apply to all the other cases.

THE COURT: Mr. Edelson, I cut you off a moment ago, but go ahead.

MR. EDELSON: No. I cut you off before, which I apologize for.

A couple things. One is I don't believe that we've engaged in damage discovery, and all this has to -- now we're starting over. Again, in three of the four sample cases, we've gotten no discovery at all. So that idea we just don't accept.

I'd be very -- well, I feel like we've got to level set for a second.

So in a class-action complaint, for example, we have to say certain things like numerosity and predominance and what some of the common questions are. There's no requirement that you say every single common question. And that's essentially

what they're saying.

So even if you -- if there was some new rule, the Mr. Mester rule, that if you're switching your certification theory, you've got to amend, there's no way that rule would say: And before you're done with discovery, you've got to list exactly the issues and no more.

And I think they kind of make that point by saying: Right. Like, the expert discovery and testimony might impact that. So generally what happens is we get discovery and then we'll go to our experts, and the experts will say: You know, this is our opinion, and that will affect things.

The idea that we've been hiding the ball in this hearing is a surprising one to me. If you read the transcript, I think I've been incredibly clear. I said absent something which I cannot conceive of, and I was suggesting a Seventh Circuit or a Supreme Court case that does something that changes the whole ball game. Then we are proceeding the same way. I don't think I was speaking with lack of ambiguity.

So, you know, our -- you know our position.

THE COURT: So let me --

MR. EDELSON: I just wanted to make those points clear.

THE COURT: Sure. And I understand where you're coming from. But I think you would agree that it is a significant change in approach to say: We're not pursuing a

(b)(3) class in these sample cases. We instead think this should be issue-based class-wide litigation. That's a change from what I think the original vision of the sample cases was going to be.

It may be that that is the kind of change that happens in any kind of class-action litigation. You file a complaint and then things happen. And then when the time comes for you to make a motion for class certification, that is the ordinary time for you to then put your cards on the table and say: Okay. Now here's what we're doing.

I get that generally. But I think specifically in this particular case, this particular MDL, this is a bit of a change that, I think reasonably, is causing people to pause for a moment to say: Well, wait. What are we doing? And how are we going to get there?

MR. EDELSON: With respect, Judge, we were discussing that we might have to do an issues class back when we objected to the medical monitoring deal.

And I could see there could be an incredible amount of angst if we were kind of going in the other direction. Instead of narrowing the scope, expanding that. I could see then them rightly flipping out, if I can be that casual here.

Here, we're narrowing that. So I am not quite understanding the consternation.

By the way, they do have a very easy mechanism to

nail us down in terms of what issues we think should be certified. Serve us with a contention interrogatory, and we will respond to it.

We are not trying to hide the ball at all. And I apologize that we're speaking, you know, kind of abruptly about really important issues. And so I'd rather -- if they want to know specifically what issues we think should be certified, I'd rather have a chance to spend a couple weeks and put it on paper rather than just be bound right now.

But I think that's a better way to proceed.

THE COURT: Do you need anything from me right now?

MR. EDELSON: I -- we think that we'd speed up these cases by years if we just get the discovery from the state cases.

We understand the argument that Judge Lee --

THE COURT: I'm sorry. Let me rephrase my question.

Do you need me to set a deadline for something specific right now, as I sit here today, for you to have something to do --

MR. EDELSON: Apologies.

THE COURT: -- in the short run?

MS. HAUSMANN: A short extension of the schedule might be procedurally helpful, because I believe because this hearing was set -- was delayed, I think that we may have passed the current deadline for class certification motions.

THE COURT: That's fair enough. Why don't I just strike the current schedule.

MS. HAUSMANN: That also works. Thank you, Your Honor.

THE COURT: Which isn't imposing a stay on anything. I am just lifting the deadlines so that you can continue to meet and confer and talk about immediate next steps, which my hope would be continue to pursue the class rep depositions and the document issues you're having while waiting further guidance from me as to whether I want an alternative procedural vehicle to tee up some of the issues we've discussed, or whether I say: I'll give you a little bit more guidance in terms of the scope of discovery. But I don't know what the motion for class certification will look like until we get a motion for class certification. And I don't think there needs to be an amended complaint. I might say that. But I need to think about that a little bit further. But I don't want you to walk out of here without at least some concrete action from me, which is I struck your deadlines.

On behalf of any of the defendants, is there anything you need from me immediately?

MR. MESTER: No, Your Honor.

THE COURT: Thank you for taking the time for the discussion this morning and for being here. I will continue to think about the issues raised in the status report and endeavor

to give you some further guidance as soon as I can.

But with that, we'll be adjourned.

MR. EDELSON: Thank you, Your Honor.

THE COURT: Thank you.

MR. MESTER: Thank you, Your Honor.

(Proceedings concluded.)

C E R T I F I C A T E

I, Colleen M. Conway, do hereby certify that the foregoing is a complete, true, and accurate transcript of the Hearing proceedings had in the above-entitled case before the HONORABLE MANISH S. SHAH, one of the Judges of said Court, at Chicago, Illinois, on March 22, 2023.

/s/ Colleen M. Conway, CSR, RMR, CRR — *03/23/23*

Official Court Reporter
United States District Court
Northern District of Illinois
Eastern Division

Date